SUPREME COURT U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1972

NO. 73-1422

PETER J. MARTINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1973

NO. _____

PETER J. MARTINO,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner Peter J. Martino prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on February 21, 1974.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the appendix (Ap. A, p. 1). The order denying the 2255 motion and the opinion entered by the United States District Court for the Southern District of Mississippi are unreported and appear in the appendix (Ap. C and D, pp. 3-12).

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on February 21, 1974 (Ap. B, p. 2). The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

WHETHER PETITIONER WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH AMENDMENT AND TO DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT WHERE HIS TRIAL COUNSEL WAS SO AFFECTED BY ALCOHOLISM THAT HE DID NOT EVEN COMPREHEND THE CRIME CHARGED AND WHERE HE WAS UNABLE TO PREPARE INSTRUCTIONS OR MAKE PROPER OBJECTIONS VITAL TO PETITIONER'S DEFENSE.

CONSTITUTIONAL PROVISION INVOLVED

Fifth Amendment: "No person shall * * * be deprived of life, liberty or property, without due process of law * * *."

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right * * * to have the assistance of counsel for his defence."

STATUTORY PROVISIONS INVOLVED

18 United States Code §§ 2, 371, 1952; 28 United States Code § 2255; Mississippi Code § 2190 (1942) (Ap. F).

STATEMENT OF THE CASE

Petitioner filed a 2255 motion to vacate and set aside the judgment of conviction and sentence entered against him for conspiracy and for using facilities in interstate commerce for conducting unlawful gambling operations in violation of a Mississippi gambling statute (Section 2190, Miss. Code 1942) contrary to 18 U.S.C. § 2, 371 and 1952 (Ap. E, F, G). Petitioner alleged that he was denied effective assistance of counsel in violation of the Sixth Amendment and denied Due Process of Law under the Fifth Amendment. It was alleged that the ineffective assistance of counsel resulted from petitioner's counsel being under the influence of alcohol and mentally depressed to the extent that his faculties were impaired.

An evidentiary hearing was held on the 2255 motion. Petitioner's trial counsel testified that he started drinking excessively a year and-a-half to two years prior to the trial dates of July 5th and 6th, 1971, and that he continued to so drink right through the trial period. Trial counsel related how he could not function without alcohol as follows:

"Q Now, at the time, sir, in July of 1971, uhh, you have spoken of about two or three drinks, how would two or three drinks affect you?
"A It would bring me up to the level that I could function, and actually I was even bored drinking at that time, but I had to have it so I dranked it.

"Q And what would happen if you didn't have it, these two or three drinks?
"A I couldn't sign my name."

* * *

"Q Now, in this cause, sir, after the sentence and the notice of appeal was filed, did you write the appellate brief?
"A No, sir, I was supposed to, but I didn't.

"Q Why?
"A Well, it was, I finally determined that I was incapable of doing the work I had usually done.

"Q When did you come to this determination in your own mind?
"A Well, it was several months actually after the trial and all. I kept going over the things I had anticipated and didn't recognize during the trial and so forth, and I finally came, then I even actually tested myself and finally came to the conclusion that alcohol had affected my mental capabilities so much that I just couldn't do the work. So I started refusing cases, and that's when I quit active practice of law for all practical purposes."

Prior to the trial, a final decree of divorce was granted to defense counsel's wife upon the statutory ground of habitual drunkenness.

The evidence was uncontroverted that on the eve of the second day of the trial, petitioner's counsel attempted to prepare instructions after having three or four drinks but was unable to do so. He retired and arose at 4:00 a.m. on July 6, 1971, and had one drink. He went to the office of co-defendant's lawyer to prepare jury instructions. Unable to prepare the instructions he went to a lounge, had two more drinks and went to court for the last day of trial.

On the last day of trial, petitioner's counsel did not request any instructions. He did not object to highly prejudicial instructions of the district judge directing the jurors to decide the guilt or innocence of the two defendants jointly rather than individually.

Although evidence of guilt was overwhelming as to petitioner's co-defendant (his brother), in contrast with the evidence against petitioner, no objection was made by the latter's trial counsel when the jury was handed a verdict which read in pertinent part as follows:

"JURY VERDICT"

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 3 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 3 OF THE INDICTMENT."

(Emphasis added).

In his opinion on the 2255 motion, the district judge admitted preparing the verdict form. He found that such form was in order since the facts showing guilt of both defendants were so overwhelming as to obviate the necessity for any different conclusion about either defendant (Ap. D, p. 8).

Petitioner's counsel, before and during the trial, conducted the defense on the basis that no Federal crime was charged. Counsel, as a result of suffering from functional alcoholism, was simply unable to comprehend that an indictment alleging that petitioner and his brother used wire facilities in interstate commerce to facilitate gambling operations in violation of a Mississippi gambling statute, stated a crime in violation of 18 U.S.C. § 1952.

At the 2255 hearing, the Government introduced evidence from its employees that petitioner's counsel was not intoxicated during the two-day criminal trial. In this regard, defense counsel testified that he was a "functional drunk" and people could not tell that he was drinking. He said, "It was always in my blood stream and I just took a drink or two to get me back on my feet where I could function."

Adverting to the erroneous charges and unprecedented verdict form, those particular errors were not submitted initially to the United States Court of Appeals for the Fifth Circuit on appeal of the original conviction and sentence. Such errors were presented in a supplemental petition for rehearing en banc. The petition was denied and the issues therein were submitted to this Court (Case No. 72-584) with the admonition in the petition that it was impossible to tell whether or not the Fifth Circuit considered the questions raised in the supplemental petition for rehearing en banc.

It should be noted that ineffective assistance of counsel cannot be raised for the first time on direct appeal. **United States v. Prince**, 456 F.2d 1070 (5 Cir. 1972).

Following the 2255 hearing the district judge denied the motion and found **inter alia**, "There was never once any aspect of * * * [petitioner's counsel's legal] service which could be characterized as farcical, or a mockery of justice, or shocking to the conscience of the Court." (Ap. C, D). The Fifth Circuit affirmed without a written opinion (Ap. A).

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS OF APPEALS AS TO THE STANDARD FOR EFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment guarantees that a criminal defendant shall enjoy the right "to have the assistance of counsel for his defense." This guarantee was interpreted by the Supreme Court to mean not only the right to counsel but the right to effective or adequate assistance of counsel in **Powell v. Alabama,** 287 U.S. 45, 77 L.Ed. 158, 53 S.Ct. 55. Since **Powell,** the Court has long recognized that the right to counsel is the right to the effective assistance of counsel. See **McMann v. Richardson,** 397 U.S. 759, 25 L.Ed.2d 763, 773, 90 S.Ct. 1441; **Reece v. Georgia,** 350 U.S. 85, 90, 100 L.Ed. 77, 83, 76 S.Ct. 167 (1955); **Michel v. Louisiana,** 350 U.S. 91, 76 S.Ct. 158, 164 (1955); **Glasser v. United States,** 315 U.S. 60, 69-70, 86 L.Ed. 680, 698, 699, 62 S.Ct. 457 (1942); **Avery v. Alabama,** 308 U.S. 444, 446, 84 L.Ed. 377, 379 60 S.Ct. 321 (1940).

Although helpful guidelines for determining a standard of competency for counsel have not been promulgated, the Court in **McMann v. Richardson, supra,** noted that a trial counsel's "advice * * * [should be] within the range of competency demanded of attorneys in criminal cases." Then, the Court admonished "[T]hat if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent

counsel, and the judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts."

As stated above, "proper standards of performance" have not been delineated by this Court. Thus, the Courts of Appeals have attempted to determine those standards. In announcing their standards several of the Circuits are out of harmony with each other.

Although the Fifth Circuit by affirming the decision of the lower court appears to be approving the "farce and mockery" test or standard applied by the district judge, that Court has recently disapproved such standard in **West v. Louisiana,** 478 F.2d 1026 (5 Cir. 1973), wherein the Court held:

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render **and rendering** reasonably effective assistance."

Most recently the Sixth Circuit likewise abandoned the "farce and mockery" test as a meaningful standard for testing Sixth Amendment claims. In its place the Sixth Circuit has adopted the standard of the Fifth Circuit, holding that assistance of counsel required under the Sixth Amendment is counsel reasonably likely to render and rendering reasonably effective assistance. **Beasley v. United States,** (Case No. 73-1351, opinion filed in 6 Cir., 2/1/74).

The District of Columbia Circuit in **Scott v. United States**, 427 F.2d 609 (DC 1970) has also condemned the "farce and mockery" standard for determining whether counsel's assistance was inadequate. The Court in **Scott** sets forth the following standard of competency which differs, however, from the Fifth and Sixth Circuits:

> "The appropriate standard for ineffective assistance of counsel * * * is whether gross negligence blotted out the essence of a substantial defense."

In direct conflict with the standards set by the D.C. Circuit and the 5th and 6th Circuits are those Courts of Appeals, which have held the subjective "farce and mockery" or "travesty of justice" standard is appropriate for reviewing a charge of ineffective assistance of counsel. **Hester v. United States** (relying on **Mitchell v. United States**, 104 U.S. App. D.C. 57, 259 F.2d 787, 793), 303 F.2d 47 (10 Cir. 1962); **United States ex rel Feeley v. Ragen**, 166 F.2d 976, (7 Cir. 1948); **United States v. Stahl**, 393 F.2d 101 (7 Cir. 1968); **United States v. Carr**, 459 F.2d 16 (7 Cir. 1972).

2. THE DECISION BELOW RAISES IMPORTANT QUESTIONS INHERENT IN EVERY CRIMINAL TRIAL AS TO THE MINIMUM STANDARDS THAT DEFENSE COUNSEL MUST MEET TO SATISFY THE CONSTITUTIONAL REQUIREMENTS OF EFFECTIVE ASSISTANCE OF COUNSEL AND DUE PROCESS OF LAW.

The Fifth Circuit's decision in the case, **sub judice**, apparently approves the "farce and mockery" standard employed by the district judge, notwithstanding its stricter standard for competency of counsel announced in **West v. Louisiana, supra.** Clearly, the varying standards set forth by other Courts of Appeals as to what constitutes effective assistance of counsel demonstrates the compelling and present need for this Court to set forth guidelines regarding minimum standards of competency that criminal trial lawyers must satisfy in order that their clients may receive the kind and type of defense which the Constitution commands.

Criticism of inadequate and incompetent trial counsel in criminal cases is growing. Accordingly, this Court should commence the difficult task of applying qualitative standards to the issue of effective assistance vel **non** of counsel.

The case, **sub judice**, presents the need for a minimum standard that should be required of trial counsel, viz., that he be free of the impairment of functional alcoholism as proved in the record. Considering the petitioner's trial counsel's psychological dependence on alcoholic beverages before, during and after the trial in order

to "function"; considering counsel's proceeding on the highly erroneous theory that no Federal crime was committed; considering counsel's inability to prepare instructions and to object to fundamentally infirm instructions as well as his reticent acceptance of the unprecedented verdict form reflects the flagrant impropriety of the decision below.

Assuming **arguendo** the absence of Fifth and Sixth Amendment violations, the supervisory power of this Court over proceedings below should never tolerate a conviction in a Federal criminal trial, where the life and liberty of a defendant is subject to a defense by counsel, who is admittedly impaired by alcoholism.

CONCLUSION

For these reasons a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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By_____
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CERTIFICATE OF SERVICE

I hereby certify that three copies hereof were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, this ____ day of March, 1974.

_____

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 73-3234
Summary Calendar*

PETER J. MARTINO,
Petitioner-Appellant,

versus

UNITED STATES OF AMERICA,
Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Mississippi

(February 21, 1974)

Before WISDOM, GOLDBERG, and GEE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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*Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, 5 Cir. 1970, 431 F.2d 409, Part I.

[1]See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

APPENDIX B

[TITLE OMITTED]

JUDGMENT

Before WISDOM, GOLDBERG and GEE, Circuit Judges.

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Mississippi, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby affirmed.

February 21, 1974

Issued as Mandate:

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
SOUTHERN DIVISION

CIVIL ACTION NO. 73S-72

PETER J. MARTINO
PETITIONER

v.

UNITED STATES OF AMERICA
RESPONDENT

ORDER DENYING 2255 MOTION

On the considerations and for the reasons stated in the opinion of the Court herein, dated July 25, 1973, incorporated herein by reference thereto, it is ordered and adjudged by the Court that the motion of the petitioner under 28 U.S.C. §2255 be and is hereby denied and the petitioner is assessed with all costs to be taxed by the Clerk of this Court and for which process may issue.

ORDERED AND ADJUDGED, this July 25, A.D., 1973.

UNITED STATES DISTRICT JUDGE

APPENDIX D

[TITLE OMITTED]

Peter J. Martino (petitioner) with his brother "Wimpy" was indicted by a Federal grand jury and was convicted on a three count indictment for engaging in a conspiracy to conduct gambling operations through the channels of interstate commerce in violation of 18 U.S.C.A. §2, §1952, §371 and §2190 Mississippi Code 1942. An appeal from that conviction was affirmed by this Circuit in 459 F.2d 1032 and certiorari was denied in 93 S.Ct. 903. The petitioner interposes a collateral attack on his conviction of that offense and moves the Court to vacate the sentence imposed under 28 U.S.C. §2255. The sentence was not imposed in violation of the Constitution or law of the United States; the Court was not without jurisdiction to impose such sentence, and the sentence was not in excess of the maximum amount authorized by law as the statute provides, but the petitioner contends that at the trial he was without benefit of effective counsel. The trial commenced on July 5 and the jury verdict was returned July 6, 1971. These brothers in this gambling business literally reeked with guilt as the evidence overwhelmingly showed, and the jury evidenced that conclusion by writing the word "yes" in addition to putting an "X" mark in the rectangle opposite the form for guilt on the three counts of the indictment. Peter J. Martino when arrested at the scene of the crime spontaneously remarked: "I'll sue them, I hope I am convicted, I will sue Western Union for selling me something illegal. Q. Did he say for selling me something illegal? A. Yes sir he did." Record 205.

Significantly, the only evidence adduced by the petitioner on this motion was the testimony of Edward G. Tremmel. He was attorney of record for Peter J. Martino and Warren Luke "Wimpy" Martino. It is contended on this collateral attack that Tremmel was ineffective as counsel because of his drinking of beer and Scotch. This pattern of behavior characterized this case from its inception. The Court heard and overruled joint motions of the Martino brothers to dismiss Count 1 signed by Edward G. Tremmel with local counsel; the Court heard and overruled joint motion of the Martino brothers signed by Edward G. Tremmel for production and inspection under Rule 16. Edward G. Tremmel presented and the Court overruled the joint motion on behalf of the Martino brothers to dismiss the indictment because bookmaking and gambling was openly tolerated on the Mississippi Gulf Coast. Edward G. Tremmel presented and the Court overruled a motion on behalf of both defendants to dismiss Counts 1, 2 and 3 of the indictment on constitutional grounds. Edward G. Tremmel presented to the Court and the Court overruled a motion for a bill of particulars. Edward G. Tremmel and his local associate (Schwan) moved the Court under Rule 14 for a severance from the case of the co-defendant "Wimpy." Edward G. Tremmel as sole counsel for Warren Luke Martino moved the Court to quash the affidavit and search warrant as against certain property of Warren Luke Martino. Significantly, the handwriting of Edward G. Tremmel perfectly matches in every respect the handwriting on the notice of appeal dated July 9, 1971, and his signature on the motion on behalf of both of these brothers that they be released from the execution of the judgment of this Court pending their appeal. This was a very hard fight throughout the entire course of these hearings and this trial. Counsel Tremmel

steadfastly argued and forcefully contended before the Court that the indictment in this case was a nullity because it relied in part upon the gambling laws of Mississippi which were remedial and not penal. He never changed that contention or missed an opportunity to inject it before the Court and the jury.

From this very extensive evidentiary hearing and trial of these motions and the hearing before the jury, this Court finds as a fact and adjudges as a matter of law: that the petitioner has not shown this Court by a preponderance or by the greater weight of the more convincing evidence that Edward G. Tremmel at any time during the trial of any aspect of this case was ineffective as counsel within the purview of the law; that Tremmel conducted himself with all propriety and very effectively and with great zeal in behalf of the best interest of his client. There was nothing farcical, or ineffective about Tremmel's professional representation of petitioner. The Court during and throughout the entire course of hearing of every aspect of this case found absolutely nothing that could be characterized as in bad faith, a sham, a pretense, or without adequate opportunity for a conference and preparation. The Court was certainly not shocked with Tremmel's representation of his client but was favorably impressed with his industry and ingenuity in presenting his points. At the conclusion of his case, Tremmel moved for a judgment of acquittal, and got the benefit of the Court's adverse ruling at every turn in preserving his record. The contention of ineffective counsel in this case is itself a sham and a mockery at criminal justice. The petitioner's motion in its entirety is completely without merit and will be denied.

Tremmel represented the petitioner in a gambling case in the Federal court in Detroit and represented him in another gambling case in Philadelphia, Pennsylvania, at the time and was handling these cases for petitioner in conjunction with this case for violation of gambling laws. No psychiatrist testified as to any physical trait of Edward G. Tremmel which would have retarded his ability to represent petitioner. Tremmel and petitioner have been close personal friends for many years and petitioner never complained to the Court of inadequate representation or ineffectiveness of counsel. Petitioner was brought to the hearing from a penal institution in Texas, but he sat mute during and throughout the entire trial, and it is inferred that if he had noticed or knew of any ineffectiveness of his friend and lawyer at his trial that he would have certainly said so at this hearing.

The form of the verdict is criticized but the instructions of the Court clearly advised the jury as to their right and duty to consider the evidence against each defendant separately on each separate count and make a proper verdict thereon.[1] There was nothing farcical about

[1]In Government's Exhibit No. 7 which is Volume II of the transcript of the trial at pages 376-377, the Court instructed the jury: "Now as you have noted a separate crime or offense is charged against these two defendants in each of three counts of this indictment. Each offense and the evidence applicable thereto should be considered by you separately. In determining these defendants are guilty or not guilty of each one of these counts of this indictment consider it separately by the count.

"The fact that you may find some or all of the accused guilty of one offense should not control your verdict with respect to the other. In other words, you are privileged to find these defendants guilty or not guilty on either one or more of these charges of this indictment, and the fact that you would find him guilty or not guilty on one or more counts should not have any effect on your determination as to the guilt or innocence of these defendants on the other count."

Tremmel's professional service in this case. The Court prepared the form of verdict and able and experienced counsel for the Government did not complain of it, and Tremmel did not. The facts showing guilt of both defendants was so overwhelming as to obviate the necessity for any different conclusion about either defendant. Tremmel's service certainly did not result in any travesty upon justice when both of his clients were convicted. During and throughout the entire course of these hearings and trial of this case the Court observed nothing but skilled representation by counsel at all times in the highest tradition of professional legal service. There was never once any aspect of such service which could be characterized as farcical, or a mockery of justice, or as shocking to the conscience of the Court. The several motions mentioned were obviously prepared by Tremmel and were presented by him in a skillful manner in a proper representation of his clients at all times. The standards in this Circuit as to effective counsel show that the rambling and vague and inconclusive and unconvincing scatter gun charges as to Tremmel's mental aberration do not arise to the dignity of proof of ineffective counsel as to his service in the courtroom and in the presence of the Court and under the watchful and alert eye of his adversary.[2]

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[2]It is a rarity to ever find competent counsel in such desperation and so frustrated as to have the audacity to contend that his representation of a client before the Court was so farcical as to attract the attention of the Court and focus upon his performance as a mockery of justice. Jimmy A. Foster v. Dr. George J. Beto, Director, (5CA) 412 F.2d 892, 893 the Court held: "In considering the question of effective assistance of counsel, this Court formulated the following standard: It has been specifically held that a charge of ineffective assistance by appointed counsel should not be sustained unless it very clearly appears well grounded. * * * It has been held that lack of effective representation by counsel means representation so lacking in competence that it becomes the duty of the court or the prosecution to observe and correct it. * * * It is the general rule that relief from

A 2255 motion or habeas corpus is not a proper substitute for a direct appeal. The form of the jury verdict and the effectiveness or ineffectiveness of trial counsel was a matter of record before the Court for its review on direct appeal and on certiorari to the Supreme Court. Tremmel gave notice of appeal over his signature and he sought a modification of the sentence during appeal over

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a final conviction on the ground of incompetent or ineffective counsel will be granted only when the trial was a farce, or a mockery of justice, or was shocking to the conscience of the reviewing court, or the purported representation was only perfunctory, in bad faith, a sham, a pretense, or without adequate opportunity for conference and preparation."

United States v. Richard Owen Long, (5CA) 419 F.2d 91, 94, the Court said: "Appellant contends that the fact that trial counsel failed to object to testimony except for one instance, failed to summon character witnesses to support him and moved for a verdict of acquittal only upon being 'reminded' by the Court, establishes lack of effective assistance. A review of the record simply does not bear this out. In almost any case a hindsight combing of the record will reveal possible alternatives in trial tactics. For this reason the rule is well established that counsel's actions or omissions must be of such a nature as to render the trial a farce and a mockery of justice which shocks the conscience of the court."

Eddie Odom v. United States, (5CA) 377 F.2d 853, 858, the Court said: "We have found no Supreme Court decision basing a finding of deprivation of a fair and impartial trial on lack of effective appointed counsel, and lower courts have been somewhat less than explicit as to what does and does not constitute effective assistance. It is abundantly clear, however, that the guarantee does not underwrite errorless counsel, or successful counsel, or the best counsel available. It is equally true that errors of judgment and tactical errors on the part of any attorney do not constitute a denial of effective assistance. To be judged ineffective, counsel must have been '* * * so incompetent as to deprive his client of a trial in any real sense—render the trial a mockery and a farce is one descriptive expression.' Mitchell, supra, 259 F.2d at 893. Only if the attorney's conduct is 'shocking to the conscience of the Court' can the charge of ineffective counsel prevail. Scott v. United States, 6 Cir. 1964, 334 F.2d 72, cert. denied 379 U.S. 842, 84 S.Ct. 81, 13 L.Ed.2d 48."

To the same effect is Albert Lee Williams v. United States, (5CA) 443 F.2d 1151, 1153; Rex Johnson, Jr. v. Dr. George J. Beto, (5CA) 466 F.2d 528; Otis Loper v. Dr. George J. Beto, (5CA) 440 F.2d 934, 938.

his signature. His ability to formulate and sign and present these motions never ebbed or changed. It is said that the appeal was handled by other counsel who had the full opportunity to present the question of adequacy of counsel but did not do so. The record before the United States Court of Appeals in this case showed that Tremmel considered the instructions of the Court as adequate and did not request additional instructions. It likewise showed that he took no exceptions to the charges of the Court and such charges were apparently deemed adequate by both appellate Federal courts. There must be an end even to criminal litigation. A criminal is not entitled to go through with a full-scale trial of his case, and in his manner treat it as a mere dress rehearsal and relitigate it on a subterfuge as in this case.

A defendant in a criminal case is entitled to a fair trial and to representation by competent counsel of his choice but is not entitled to underrate and downgrade his counsel who is unsuccessful in convincing the jury and an impartial judge of his innocence in the face of overwhelming proof to the contrary. These two Martino brothers were involved in this gambling business together. One of the motions signed and presented by Tremmel on behalf of this petitioner sought a delay because the testimony of "Wimpy" Martino was not available and was indispensable to petitioner. The petitioner and his brother and both lawyers for the Martino brothers decided during the first night of the trial that they would not ask for any instructions and would not put on any testimony, but would rest when the Government rested (Record 320). That is exactly what they did. The transcript of the trial shows that Tremmel questioned all of the witnesses and made repeated objections to testimony, and most of those objections were

sustained. The first volume of this transcript is replete with questions by Tremmel and objections by him to testimony that conclusively show that he was extremely alert and on his toes at all times during this trial. It is inconceivable to this Court under the circumstances as it observed this trial unfold that anybody could say or would say that either of these defendants had ineffective counsel. They were both experienced lawyers and Tremmel testified at this hearing that he had never lost a case before a jury since his admission to the bar. Tremmel was as sharp and as alert in every respect at the hearing on this motion as he was at the trial of this case on its merits. No difference in any degree whatever was detected. Tremmel simply misconceived a legal principle involved but steadfastly relied upon his contention that a Federal indictment could not possibly rest securely upon the Mississippi gambling statute even though it was a conspiracy case, and the defendants were charged with having aided and abetted in a gambling venture conducted through the channels of interstate commerce. There was simply nothing wrong with the efficiency or effectiveness of counsel. The United States Court of Appeals and the Supreme Court of the United States have disagreed with him in this case, and the convictions of these defendants stand undisturbed. The petitioner and his brother had a perfectly fair trial.

No defendant is entitled to a perfect trial. Every substantial right of the petitioner and his brother was respected and carefully safeguarded and protected.[3] Harm-

[3]In United States v. Hector R. Calles, (5CA), No. 72-395, decided July 11, 1973, in speaking of the net worth case where many alleged errors were committed, the Court said: "Even if this set of circumstances constituted error, we conclude that it was harmless beyond reasonable doubt. Appellant was entitled to a fair trial, not a perfect one, and in our judgment he received a fair trial.

less error or irregularity not affecting substantial rights must be disregarded.[4]

It is the firm opinion of the Court as a matter of fact under all of the facts and circumstances and inferences that this petitioner has had the benefit of effective counsel during and throughout the entire course of this litigation. He has not been denied any substantial right. Every consideration has been given by the Court to his rights at every stage of this case. The evidence before the Court with inescapable inferences from established facts shows that he has no basis or grounds for making any collateral attack on the jury verdict and consequent order of conviction and sentence. The United States Court of Appeals for the Fifth Circuit and the Supreme Court have carefully reviewed and passed upon and approved the judgment of conviction in this case. The 2255 motion to vacate and set aside the sentence of Peter J. Martino is without merit and will be denied.

An order accordingly will be entered by the Court.

July 25, 1973

/s/ Harold Cox

UNITED STATES
DISTRICT JUDGE

"Rarely, if ever, is a hotly contested adversary proceeding conducted perfectly, but in our judgment appellant received a fair trial in this case. United States v. Harden, 469 F.2d 65."

[4]Civil Rule 61—Harmless Error provides: "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

APPENDIX E

Judgment and Commitment (Peter J. Martino)

On this 13 day of July, 1971, again came the attorney for the government and the defendant appeared in person and by his attorney, Edward G. Tremmel and Jules A. Schwan, and upon arraignment on March 24, 1967, the defendant entered a plea of not guilty.

It is Adjudged that the defendant upon his plea of not guilty and a verdict of guilty by a jury on July 6, 1971, has been convicted of the offense of violating Sections 1952, 2 and 371, Title 18, United States Code: Unlawfully using and aiding and abetting and causing the use of facilities in interstate commerce with intent to carry on and facilitate the carrying on of unlawful gambling activities in Mississippi, and conspiracy to do so, as charged in Counts I, II and III of the Indictment and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of Count I 2 years, Count II 2 years. The sentence on Count II to be consecutive to and to commence at the expiration of the sentence imposed on Count I, making a total sentence of 4 years to be served.

It is Adjudged that as Count III, the imposition of sentence be suspended and defendant placed on probation for a period of five years. Said probation to commence after release from the service of sentences imposed on Count I and II.

It is Ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

s/ JUDGE HAROLD COX

UNITED STATES JUDGE

ROBERT C. THOMAS, CLERK

APPENDIX F

STATUTES INVOLVED

Section 2 of Title 18, United States Code:

§2. Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

Section 371 of Title 18, United States Code:

§371. Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

Section 1952 of Title 18, United States Code:

§1952. Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

Section 2190 of the Mississippi Code Annotated, 1942, Volume 2A (Recompiled):

§2190. Gambling—wagers generally.

If any person shall encourage, promote or play at any game, play or amusement, for money or other valuable thing, or shall wager or bet, promote or encourage the wagering or betting any money or other valuable things, upon any game, play, amusement, cock-fight, Indian ball play, or duel, or upon the result of any election, event or contingency whatever, upon conviction thereof, he shall be fined in a sum not less than five dollars nor more than five hundred dollars; and, unless such fine and costs be

immediately paid, shall be imprisoned for any period not more than twenty days nor less than five days.

28 U.S.C. §2255. Federal custody; remedies on motion attacking sentence

A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

A motion for such relief may be made at any time.

Unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the court shall cause notice thereof to be served upon the United States attorney, grant a prompt hearing thereon, determine the issues and make findings of fact and conclusions of law with respect thereto. If the court finds that the judgment was rendered without jurisdiction, or that the sentence imposed was not authorized by law or otherwise open to collateral attack, or that there has been such a denial or infringement of the constitutional rights of the prisoner as to render the judgment vulnerable to collateral attack, the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or grant a new trial or correct the sentence as may appear appropriate.

A court may entertain and determine such motion without requiring the production of the prisoner at the hearing.

The sentencing court shall not be required to entertain a second or successive motion for similar relief on behalf of the same prisoner.

An appeal may be taken to the court of appeals from the order entered on the motion as from a final judgment on application for a writ of habeas corpus.

An application for a writ of habeas corpus in behalf of a prisoner who is authorized to apply for relief by motion pursuant to this section, shall not be entertained if it appears that the applicant has failed to apply for relief, by motion, to the court which sentenced him, or that such court has denied him relief, unless it also appears that the remedy by motion is inadequate or ineffective to test the legality of his detention. As amended May 24, 1949, c. 139, §114, 63 Stat. 105.

APPENDIX G

[TITLE OMITTED]

[Filed March 29, 1973]

(28 U.S.C. 2255) MOTION TO VACATE AND SET ASIDE SENTENCE

Petitioner, PETER J. MARTINO, respectfully shows to the Court:

1. He is presently serving a sentence of four years imprisonment imposed by this Court on July 13, 1971 in Criminal Action No. 8714. Petitioner was convicted of the offenses of violating Sections 1952, 2 and 371, Title 18, United States Code: Unlawfully using and aiding and abetting and causing the use of facilities in interstate commerce with intent to carry on and facilitate the carrying on of unlawful gambling activities in Mississippi, and conspiracy to do so, as charged in Counts I, II and III of the Indictment.

2. The sentence was imposed in violation of the Constitution of the United States and/or is subject to collateral attack in that petitioner was deprived of and denied effective assistance of counsel and had incompetent counsel in violation of the Sixth Amendment of the United States Constitution. It is expressly represented that petitioner's counsel was under the influence of alcohol and mentally depressed to such an extent prior to and during the trial, that petitioner did not receive advice and assistance of counsel sufficient to afford him quality of representation guaranteed by the Sixth Amendment. Further, that peti-

tioner's counsel's faculties were so impaired by his being saturated with alcohol both prior to and during the trial that the manifest interests of justice and the requirements of the fair administration of justice compel the vacating of the judgment and sentence.

3. The attached statement under oath of Edward George Tremmel, trial counsel for the petitioner (which statement is made a part hereof by reference) supports the allegations that trial counsel was under the influence of alcohol and mentally depressed prior to and during the trial. It has been held in this Circuit that allegations in a Section 2255 petition that trial counsel was under the influence of alcohol prior to and during the trial required consideration of matters outside the record and an evidentiary hearing on the question should be afforded the petitioner.[1]

4. In addition to the foregoing, petitioner's counsel's competency fell below the standard of competency for attorneys in the community in that, inter alia, he did not understand that gambling as defined in §2190, Miss.Code 1942 (Vol. 2A) constitutes a crime under Mississippi law, that comes within the purview (of unlawful activity) of the Federal statute (18 U.S.C. §1952). Because of his complete misunderstanding of petitioner's case, trial counsel assured petitioner that no crime in Mississippi had been committed to which the Federal statute could apply. This belief of trial counsel was based on the grossly incompetent reasoning that since the Mississippi gambling laws are remedial, carry no jail sentence and are to be liberally

[1]United States v. Zarzour, 432 F.2d 1, 5 (5 Cir. 1970); Zarzour v. United States, 409 F.2d 605, 606 (5 Cir. 1969).

construed, a violation of said laws would not constitute a crime under the Federal statute. These allegations are factually supported in Tremmel's attached statement at pages three through five.

5. Fundamental to the Government's case was the need to adduce some evidence showing that petitioner was inside the "406 Club" in a proprietary or active role. The witnesses testified that they never saw Peter Martino at the gambling club (R 82, 115, 129-131, 147, 201, 261, 262, 310).[2] On the other hand, the overwhelming weight of evidence showed that the Club was managed and run by Warren Martino and a Joe Tarrento (R 31, 81-82, 115, 129-131, 145-151, 197-199, 201).

A review of the record reveals that the Government's entire case against petitioner on the conspiracy and substantive counts consisted of an FBI agent's testimony that petitioner stated at the time of his arrest that he would sue Western Union for selling something illegal (R 205, 206).

6. Due to the ineffectiveness and incompetency of counsel, the only damaging evidence against the petitioner as to his presence in the Club during a material time was allowed to be introduced without any objection and without a proper cautionary instruction. The following testimony of Government witness, Louis Richman, shows the Government impeaching him without any basis and without any cautionary instruction being given to the jury as to the limited use of the alleged conflicting extra judicial state-

[2]Reference to the transcript of the trial proceedings will be by the use of the symbol "R".

ment of petitioner.[3] This occurred during the following proceedings:

"Q Well, did you know Peter J. Martino (R 130) at all? When did you first learn who he was?

"A Well, it was sometime after that I was going into the 406 Club that a couple of friends there told me who he was, that he was Wimpy's brother, I didn't know him, so I never met him, I don't, I don't recall seeing him there.

"Q Yes, sir, I am not asking you whether you met him or not. I am asking you if you saw him in the club there, the man that you later learned was Peter Martino did you ever see him in the club?

"A No, I don't recall ever seeing him.

"Q Do you remember making a statement to FBI Agent William Dean Jansen on June the 7th of 1966 with reference to Jeter J. Martino?

"A (No answer.)

"Q Would you like to refresh your recollection from this statement?

"A Yes sir. (Witness examined document.) (R 131) I can't say that that is sir, I can't ever recall making a statement like that that I saw Mr. Martino put money in the safe. (Emphasis added).

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[3]United States v. Hicks, 420 F.2d 814 (5 Cir. 1970).

"Q All right.
"A I swear to God."

At the time of the impact on the jury of this statement, the Court was not asked to caution the jury that the statement about petitioner putting money in the safe could not be considered as establishing the truth of the matter.[4]

7. Due process of law under the Fifth Amendment of the United States Constitution and effective assistance of counsel under the Sixth Amendment were denied to this petitioner in view of the exceedingly prejudicial instructions to the jury and the unprecedented verdict form presented to the jury. Failure of the petitioner to be accorded due process of law as guaranteed by the Fifth Amendment and effective assistance of counsel under the Sixth Amendment was accomplished as a direct result of petitioner's counsel being under the influence of alcohol and mentally depressed to the extent that his faculties were impaired.

Adverting to the trial judge's instructions to the jury and the verdict form presented to the jury, it is respectfully submitted that this Court embarked upon a series of charges which clearly and unequivocally caused the jurors to consider and deliberate upon the joint criminal responsibility of the defendants rather than to have the jurors deliberate on the individual responsibility of each defendant. This, of course, was a fundamental violation of petitioner's right to due process and effective assistance of counsel, and was especially prejudicial to petitioner whose guilt or innocence was considered jointly (rather than individually) with the overwhelming evidence of guilt of Warren Martino.

[4]See footnote 3, supra.

A review of the trial judge's instructions to the jury reflects that he repeatedly charged the jurors to give separate consideration to each one of three counts of the indictment, but at no time did he advise the jurors to consider the criminal responsibility, if any, of the defendants on an individual basis, as is seen from the following: (R 356)

> "So those are the three counts of this indictment with which we are concerned and which you are called on to decide as to whether or not these defendants are guilty or not guilty, giving separate consideration to each one of the three counts of the indictment."[5]

Again, at page 359 of the record the trial judge charges the jurors:

> "Now you are to perform this duty of making this determination as to the guilt or the innocence of these defendants of each one of these three counts of this indictment separately without any bias or prejudice whatsoever.

Again, on page 376 of this record the trial judge charged the jurors:

> "Each offense and the evidence applicable thereto should be considered by you separately. In determining these defendants are guilty or not guilty of each one of these counts of this indictment consider it separately by the count."

Again, the trial judge precluded the members of the jury from determining the individual innocence or guilt of each defendant on each count by charging them as follows just prior to giving the verdict form to the jurors:

> "You understand you have got three counts. You (R 378) will decide as to the guilt or innocence of these (R 379) defendants on these three counts, so let's talk about count one. You have got to consider them [the counts] separately anyway. If your determination, if all twelve of you say that these defendants are not guilty of the offense charged in count one the form of your verdict as written out on this verdict as it will be 'We, the Jury, find the defendants to be not guilty on count one of the indictment', in which event you would put your x mark in the rectangle opposite that form of verdict as to count one. On the other hand, if your unanimous determination is that these defendants are guilty on count one the form of your verdict would be 'We, the Jury, find the defendants to be guilty as charged of the offense stated in count one of the indictment', in which event it would be necessary for you to put your x mark in the rectangle opposite that form of verdict, and so likewise with respect to count two and count three of this indictment."

At the conclusion of the charge, the jury was handed a verdict form which in pertinent part reads as follows:

"JURY VERDICT"

"WE, THE JURY, FIND THE DEFENDANTS TO BE (R 124) NOT GUILTY ON COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 1 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 2 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE NOT GUILTY ON COUNT 3 OF THE INDICTMENT.

"WE, THE JURY, FIND THE DEFENDANTS TO BE GUILTY AS CHARGED OF THE OFFENSE STATED IN COUNT 3 OF THE INDICTMENT."

The foregoing instructions and the form of the verdict, which is unprecedented, directly violated the principle that the " 'guilt or innocence of each defendant must be determined by the jury separately. Each defendant has the same right to that kind of consideration * * * as if he were being tried alone.' " Blumenthal v. United States, 332 U.S. 539, 92 L.Ed. 154, 68 S.Ct. 248; United States v. Agueci, 310 F.2d 817, 829 (2 Cir. 1962).

Furthermore, a trial judge's jury instructions and verdict form compelling the jury to find both defendants jointly guilty or jointly innocent where there is overwhelming proof of guilt as to only one defendant (Warren Martino), departs so greatly from the accepted and usual course of judicial proceedings that such instructions and verdict form are constitutionally infirm and deny petitioner due process of law.

Because of the ineffectiveness and incompetency of counsel, and because his faculties were impaired by his admitted saturation with alcohol and his mental depression, he answered in the negative when the trial judge inquired whether he had any exceptions to the instructions given (R 380, 381).[6]

8. Because of the foregoing the judgment of conviction and sentence thereunder are illegal and void and imposed in violation of the Fifth and Sixth Amendments of the Constitution of the United States and in violation of the fair administration of justice, in that petitioner was represented by a member of the Federal Bar who did

[6]The record reflects that Edward Tremmel represented the defendant Peter J. Martino and a Mr. Schwan represented the co-defendant Warren Martino (R 391). Mr. Schwan who passed away within a year of the trial permitted Mr. Tremmel to conduct the trial (R 381).

not provide him with effective or competent assistance of counsel prior to or during the trial.

Wherefore, petitioner prays that the judgment of conviction and sentence be vacated and set aside and that he be discharged from custody immediately.

/s/ Peter J. Martino

PETER J. MARTINO, Petitioner

John Sekull
419 W. Howard Ave.
Biloxi, Mississippi

James J. Hogan
420 Lincoln Road
Miami Beach, Florida

and

Richard M. Gale
518 Biscayne Building
19 West Flagler Street
Miami, Florida 33130

By /s/ James J. Hogan

Attorneys for Petitioner

COUNTY OF)
) SS
STATE OF TEXAS)

Before me, the undersigned authority, personally appeared PETER J. MARTINO, who being by me first duly sworn, deposes and says that he has read the foregoing and states that it is true and correct.

/s/ Peter J. Martino
PETER J. MARTINO

SWORN TO and SUBSCRIBED before
me, this 20th day of March, 1973,
at Texarkana, County of
Bowie, State of Texas.
Parole Officer, Fed. Crim. [illegible]
Texarkana, Texas

Authorized by the Act of July [illegible]
[an illegible rubber-stamped line here]

/s/ Terrell H. King
Parole Officer, State of Texas

MY COMMISSION EXPIRES: